IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12349 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANISHABEN K. PATEL - Petitioner(s)
Versus
DISTRICT PRIMARY EDUCATION OFFICER - Respondent(s)

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Appearance :
MR KB PUJARA for Petitioner(s) : 1,
MR HS MUNSHAW for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 27/11/2007

ORAL JUDGMENT

1. Rule. Mr.Munshaw, learned Counsel appears for respondent and waives service of notice of rule.

With the consent of the learned Counsel for both the sides, the matter is finally heard today.

2. The only question which arises for consideration is whether the instructions issued on 4.6.2004 in purported exercise of the power under Section 54 of the Bombay Primary Education Act are having the retrospective effect or prospective effect.

3. The other facts are not relevant for the purpose of this petition, but considering the nature of the controversy, the relevant facts are that the petitioner lastly was posted on 21.5.2002 at Malapur, Taluka Patan as Primary Teacher and on 8.8.2002 and her husband was transferred from Punnadiyapura Khareda to Gulvasana, keeping in view the policy of the Government prevailing then to keep the husband and wife at one place on priority basis. Thereafter, the instructions were issued under Section 54 of the Bombay Primary Education Act on 4.6.2004, copy whereof is produced at Annexure “F” and at the transfer camp, the petitioner applied for transfer at the school at Gulvasana on the ground that her husband, Rakeshkumar Shankarlal Patel is working as a teacher in Gulvasana Primary School. It

appears that the said request was accepted and on 16.2.2007 the order was passed for posting the petitioner at Gulvasana Primary School in view of the Resolution of the State Government dated 4.6.2004. It appears that thereafter on 18.4.2007, the Authorities have cancelled the order and transferred the petitioner outside the District at Pachakwada Primary School, Taluka Siddhpur on the ground that the petitioner has taken benefit of policy for the second time and has suppressed the fact of having taken benefit earlier. The aforesaid has resulted the petitioner to file the present petition.

4. Heard Mr.Pujara, learned Counsel for the petitioner and Mr.Munshaw, learned Counsel for the respondent.

5. As such, it appears that the issue arises for consideration in the present petition is covered by the decision of this Court in case of **Natwarlal Chhotulal Patel v. State of Gujarat & Ors.", reported in 2006(1) GLR, 803**, wherein this Court had an occasion to consider as to whether the Government Resolutions, whereby the instructions are issued can be applied

retrospectively or prospectively. This Court in the said decision at paragraphs 8 and 9 observed as under:-

> “8. The perusal of the Government Resolution dated 4.6.2004, whereby the instructions are issued shows that the same is to apply for the transfers to be affected thereafter. The instructions are as such by the Government Resolution and even if they are treated as statutory instructions, then also such would not be on higher pedestal than subordinate legislation. In a matter of subordinate legislation, it is well settled that the same will have prospective effect and it would not have retrospective effect. Therefore, if the policy is to apply prospectively, then possibly the case of the petitioners cannot be denied on the ground that the petitioners had opted for inter-district transfer once on the basis of the policy prevailing then. It is not in dispute that the petitioners have not taken benefit of inter-district transfer after 4.6.2004 or on the basis of the instructions issued after

4.6.2004. Therefore, it can be said that those teachers who opted for inter-district transfer prior to 4.6.2004 are not excluded, on the basis of the policy vide instructions dated 4.6.2004.

9. However, such teachers who opted for inter-district transfer earlier as per the policy prevailing then, would stand on a lower pedestal than those teachers who have not at all opted for inter-district transfer throughout their career. In a matter of transfer, it is well settled that they are generally in the domain of administration. The convenience of employee may be considered by the Administrative Authorities in a matter of transfer and instructions may also be issued for such purpose, but the employee whose convenience is already considered once, would not be entitled to claim right *at par* with the employee whose convenience is not at all considered in past. The petitioners are the persons whose convenience is considered once and they have taken benefit of inter-district transfer as per the policy

prevailing then. Therefore, even if the policy is to apply prospectively on reasonable construction of the policy and the instructions dated 4.6.2004, it appears that such petitioners cannot have right *at par* of inter-district transfer merely on the basis of length of service as against the teachers, who have not at all opted for inter-district transfer in past."

6. Therefore, when the policy is to apply prospectively and it is an admitted position that the petitioner has not taken benefit of transfer at one place on account of her husband serving at a different place after 4.6.2004, whether the petitioner declared the said aspects in the application form or not would be irrelevant.

7. Further, in any case, the order has been passed without giving opportunity of hearing to the petitioner and is in contravention to the above referred decision of this Court in case of **Natwarlal Chhotulal Patel (supra)**.

8. Under the above circumstances, the impugned order dated 18.4.2007 cancelling the transfer order dated 16.2.2007 cannot be sustained in the eye of

law and deserves to be quashed and set aside.

9. Hence, the impugned order dated 18.4.2007 Annexure “J” is quashed and set aside. The petition is allowed to the aforesaid extent. Rule made absolute accordingly. No order as to costs.

27.11.2007 **(Jayant Patel, J.)**

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